Supreme Court U.S.
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No. 01-1748

In The

Supreme Court of the United States

KENNETH R. WOOTEN,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. When a trial court finds that a juror seated in a child molestation case refused to deliberate upon the evidence based upon his association with the defendant and also lied about his association with the defendant during jury selection, does the trial court's removal of the juror implicate the defendant's Sixth Amendment rights?

2. When a prosecuting attorney is delegated limited authority to determine the order of criminal cases to be tried is this a due process violation of such a fundamental nature as to require reversal of child molestation convictions where there is no showing of harm to the defendant?

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STATEMENT OF THE PROCEDURAL HISTORY

On April 7, 1997, Petitioner Kenneth R. Wooten was indicted for numerous counts of child molestation by the Dade County, Georgia, Grand Jury (R-3 to 10). Petitioner filed pre-trial motions including a motion challenging the method of case assignment in the Lookout Mountain Judicial Circuit (R-39). This motion was denied by the Honorable Kristina Cook Connelly (R-55; Remand Hearing Transcript, hereafter RHT-16, 17). At the commencement of a jury trial, Petitioner renewed his motions before the trial judge, the Honorable Jon B. Wood, who also denied Petitioner's motions (RHT-11, 42; T-4). Petitioner was convicted and sentenced on various counts of child molestation (R-3 to 10; R-124). Petitioner filed a motion for new trial on July 14, 1997 (R-134) which was denied by the trial court on August 28, 1997 (R-136). Petitioner's appeal bond was granted and posted on September 18, 1997 (R-139, 140). An appeal was filed on September 24, 1997 (R-1). On September 4, 1998, the case was docketed in the Court of Appeals of Georgia.

On September 7, 1998, the Georgia Court of Appeals remanded Petitioner's case to the trial court for a hearing to establish a record on Petitioner's motion challenging the method of case assignment as Petitioner had presented no evidence before either judge who had ruled (SR-2). The trial court conducted a hearing and filed its order on June 7, 1999 (SR-1, 2). The case was re-docketed in the Georgia Court of Appeals on July 14, 1999. On September 7, 1999, the Georgia Court of Appeals transferred Petitioner's case to the Georgia Supreme Court as the case assignment issue was pending before the latter court on interlocutory appeal. *Cuzzort v. State*, 271 Ga. 464, 519 S.E.2d 687 (1999). After deciding *Cuzzort*, the Georgia Supreme Court

sent Petitioner's case back to the Georgia Court of Appeals on October 15, 1999. *Id.*

In its first opinion on April 10, 2000, the Georgia Court of Appeals reversed Petitioner's conviction based on the erroneous understanding that the reversal of the conviction in *Cuzzort* required them to reverse Petitioner's child molestation convictions even though no harm was shown. The State of Georgia filed a motion for reconsideration noting there was no conviction to be reversed in the interlocutory appeal in *Cuzzort*. The Court of Appeals' second opinion on May 19, 2000 removed the tainted reference, but it too reversed Petitioner's conviction and condemned the case assignment system as inherently harmful although no actual harm was shown. *Wooten v. State*, 244 Ga. App. 101, 533 S.E.2d 441 (2000).

On October 6, 2000, certiorari was granted by the Georgia Supreme Court to the Court of Appeals. The Georgia Supreme Court reversed the opinion of the Court of Appeals and reinstated Petitioner's conviction. *State v. Wooten*, 273 Ga. 529, 543 S.E.2d 721 (2001). Petitioner's case was once again remanded to the Court of Appeals. The Court of Appeals affirmed Petitioner's convictions. *Wooten v. State*, 250 Ga. App. 686, 552 S.E.2d 878 (2001). Petitioner sought a writ of certiorari from the Georgia Supreme Court to the Court of Appeals to review this decision. The Georgia Supreme Court denied the writ of certiorari on February 25, 2002. Petitioner timely sought review by this Court.

STATEMENT OF MATERIAL FACTS

Petitioner was tried and convicted for child molestation in Dade County, Georgia (T-1; R-3 to 10). Dade County is a part of the Lookout Mountain Judicial Circuit, a four county, four judge circuit in which the superior court judges ride the circuit and all judges handle criminal matters (RHT-41, 42). The judges prepared an annual calendar which indicated when and where each judge would appear to handle criminal matters (RHT-41, 42). All criminal matters were scheduled before the judge or judges who appeared (RHT-41, 42). The judges in their own discretion, established the annual calendar and it was subject to change without notice (RHT-42). At the time of Petitioner's trial, prior to the ruling of the Georgia Supreme Court in *Cuzzort v. State*, 271 Ga. 464, 519 S.E.2d 687 (1999), the district attorney was delegated the authority to call the cases for jury trial from a calendar consisting of all pending criminal cases (RHT-19 to 42). This general calendaring system was deemed to be efficient in that most cases were disposed of during each trial term (RHT-19 to 40).

Petitioner's case was indicted by the April 1997 grand jury (R-3 to 10) and was placed on the April 1997 term calendar for jury trials (RHT-42). Two judges were present for trials. One tried Petitioner's case which involved four counts of child molestation, aggravated child molestation and aggravated sodomy while the other judge tried a comparable case which involved charges of incest (two counts), aggravated sodomy (two counts), child molestation (two counts) and statutory rape (two counts) (RHT-42; SR-1). The trial court, on remand, specifically found there was no evidence to indicate any inappropriate use of the

authority delegated to the district attorney in sounding cases for trial (SR-1, 2).

During the course of the jury's deliberations, the jury foreperson reported to the trial court that juror Wells was not participating in deliberations (T-565). This juror's opinion of Petitioner's guilt or innocence did not arise from a consideration of the evidence but from his previously undisclosed relationship with Petitioner (T-566, 567). The trial court was aware this violated the juror's voir dire oath (T-569). The juror had dishonestly failed to reveal during voir dire that he knew Petitioner (T-575) and could offer no explanation to the trial court why he had made this omission upon specific inquiry (T-576) although he later acknowledged that he should have admitted knowing Petitioner (T-583). The trial court, in reaching its decision to remove the juror, stated the "voir dire oath has to mean something, and since this juror did not honestly comply with that voir dire oath and disclose . . . that he knew [Petitioner], I am going to replace him" (T-580). The alternate juror was seated and the jury resumed deliberations (T-582).

ARGUMENT

Reasons For Denying The Writ

A. The trial court properly exercised its discretion in removal of a juror who had lied under oath about his relationship with Petitioner

In his recitation of the facts, Petitioner ignores the actual ruling of the trial court in removing the dishonest juror. Contrary to Petitioner's assertions, the trial court removed the juror for good cause. The juror had lied on

voir dire about knowing the defendant and had refused to participate in a consideration of the evidence with the other jurors because of his relationship with Petitioner (T-565). The State of Georgia is also entitled to a fair trial. It is of paramount importance that a juror honestly reveal during the voir dire process any and all associations with the parties when queried. The juror in question failed to do this.

It is incumbent upon jurors to give truthful answers to questions on voir dire. O.C.G.A. § 15-12-132. The parties are given peremptory strikes to remove jurors who may have leanings. The parties are entitled to truthful answers to properly gauge whether or not to exercise a peremptory strike as to a particular juror. When a juror fails to give truthful answers to simple, direct questions, the justice system is in jeopardy. The oath given to jurors requires them to reach a true verdict based upon a consideration of the evidence. O.C.G.A. § 15-12-139. The juror Wells not only violated his oath to give true answers to the voir dire questions, he violated his oath to render a true verdict based upon the evidence. He lied about his relationship with Petitioner on voir dire (T-575) and then, based upon that same relationship, failed to give any consideration to the evidence presented in the case (T-565).

The analysis undertaken by Petitioner is predicated upon a juror holding out for acquittal based upon the failure of the government to prove its case. See *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987). The juror here was removed for just cause based upon his relationship with Petitioner and his lie under oath about the relationship not because he was a holdout juror who simply did not believe the government's case. See *United States v. Barone*, 114 F.3d 1284 (1st Cir. 1997).

Under Georgia law, the removal of the juror was proper. "If at any time, whether before or after final submission of the case to the jury, a juror dies, becomes ill, upon other good cause shown to the court is found to be unable to perform his duty, or is discharged for other legal cause, the first alternate juror shall take the place of the first juror becoming incapacitated." O.C.G.A. § 15-12-72. A trial court in Georgia is authorized under this code section to remove a juror provided such "exercise of discretion has a sound legal basis." *Worthy v. State*, 223 Ga. App. 612, 613, 478 S.E.2d 421 (1996). "It was not an abuse of discretion to conclude that the juror's failure to respond truthfully during voir dire, coupled with his admitted actions during jury deliberations, constituted legal cause for removal." *Norris v. State*, 230 Ga. App. 492, 495, 496 S.E.2d 781 (1998).

The trial court's ruling in removing the juror would be justified under the federal standards as well. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S. Ct. 845, 78 L. Ed. 663 (1984). The decision of the Georgia Court of Appeals in affirming Petitioner's conviction upon review of this issue comports with federal case law as well. The case law in federal decisions requires the appellate court to find the trial court's ruling in such matters to be clearly erroneous and constitute an abuse of discretion. *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

B. The limited role of the prosecutor in sounding cases for trial was not harmful to Petitioner

Prior to the decision by the Georgia Supreme Court in *Cuzzort v. State*, 271 Ga. 464, 519 S.E.2d 687 (1999), the district attorney's office in the Lookout Mountain Judicial

Circuit was delegated limited responsibilities in preparing trial calendars and sounding cases for trial in the Lookout Mountain Judicial Circuit. This circuit included Dade County, Georgia where Petitioner was tried and convicted on multiple child molestation counts (R-3 to 10). The district attorney had no discretion to determine which judge appeared to hear cases during any particular term of criminal court (RHT-41, 42). The preparation of the trial calendars consisted merely of the clerical role of placing all pending cases on a trial calendar (RHT-42). The judges, in their own discretion, would determine which judge would appear during any particular trial week and this decision was subject to change without notice (RHT-42). During each term of court, most of the pending cases were disposed of during the trial term (RHT-19 to 40). During any particular trial week, any two of the four judges might preside (RHT-41, 42).

The district attorney's role was limited during trial week to sounding cases for trial. Of the two judges present when Petitioner's case was sounded, one tried Petitioner's case which involved four counts of child molestation, aggravated child molestation and aggravated sodomy while the other judge tried a comparable case which involved charges of incest (two counts), aggravated sodomy (two counts), child molestation (two counts) and statutory rape (two counts) (RHT-42; SR-1). The trial court, on remand, specifically found there was no evidence to indicate any inappropriate use of the authority delegated to the district attorney in sounding cases for trial (SR-1, 2).

The Georgia Supreme Court analyzed the district attorney's limited role as follows:

In reviewing the district attorney's action in this case, we find that his decision to assign Wooten's case to a specific courtroom at the beginning of the criminal trial week was more analogous to other pre-trial decisions that we routinely permit district attorneys to make than to the acts of prosecutorial misconduct or structural defects in the trial process that require a reversal of the defendant's conviction. In Dade County, where Wooten was tried, two judges heard criminal jury trials during the April 1997 term of court. The district attorney had no power to decide which judges would preside that week, which citizens would be called to serve as jurors, or how the jury pool would be divided between the two courtrooms. One judge heard Wooten's pre-trial motions and denied the motion challenging the case assignment system; the other judge presided over Wooten's trial. On the same day that Wooten's case was sounded for trial in the main courtroom, the district attorney assigned a similar case involving charges of incest, aggravated sodomy, and aggravated child molestation to the annex courtroom. Once Wooten's case was assigned, the attorneys examined prospective jurors on voir dire, exercised their peremptory strikes, and selected a jury; the trial court exercised its discretion in ruling on trial motions, the admissibility of evidence, objections to arguments, and requests for jury charges; and the jury heard the evidence, received instructions on the law, and reached a unanimous verdict of guilty.

Based on these facts, we reject Wooten's argument that the illegal system violated his constitutional rights and was so fundamentally unfair that the harm was inherent in the system. Instead,

> we hold that the district attorney's limited role in assigning cases to a judge and calling the court calendar did not violate Wooten's right to due process under the Georgia Constitution or United States Constitution.
>
> *State v. Wooten*, 273 Ga. 529, 532, 543 S.E.2d 721 (2001)

No court which examined this issue has found harm. The Georgia Supreme Court in *Cuzzort* recognized that the "record fully support[ed] the trial court's finding that the district attorney . . . conducted himself in a professional and unbiased manner and used the authority given to his office *solely* to move cases more efficiently through the courts." *Id.*, 465 (emphasis provided). The trial court in Petitioner's case similarly noted the absence of any abuse (SR-1, 2). The Georgia Supreme Court determined that "[g]iven the district attorney's limited discretion and the subsequent independent roles that the trial judge and jury played, we conclude that it is highly improbable that the error in the circuit's assignment system contributed to the jury's verdict of guilty". *State v. Wooten*, 273 Ga. 529, 532, 543 S.E.2d 721 (2001). Even assuming the limited authority exercised by the district attorney was a due process violation of constitutional dimensions, it would not mandate reversal of Petitioner's child molestation convictions as it is clear beyond a reasonable doubt that the error did not contribute to the jury verdict. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

CONCLUSION

Wherefore, Respondent requests the Petition for Writ of Certiorari to the Georgia Court of Appeals be denied.

Respectfully Submitted,

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